No. 80-120

IN THE

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, and NORTHWESTERN LUTHERAN ACADEMY,
Petitioners,

v.

THE STATE OF SOUTH DAKOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Dakota

MOTION OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., TO FILE BRIEF AMICUS CURIAE

Association of Christian Schools International; Grace Brethren Church and David L. Hocking, its pastor; Calvary Cross Church of the Highlands and Reverend Donald B. Sheeley, its pastor; Scott Memorial Baptist Church and Reverend Tim LaHaye, its pastor; Christian Unified Schools of San Diego; Redwood Christian Schools; Sidney Bowen and Patricia Bowen, his wife; Peter Farrelly and Sue Farrelly, his wife; William Tschantz and Janet Tschantz, his wife; Arthur Brandwood and Cheryl Brandwood, his wife; Stanley Edington; R. Florence Murti; and R. Suzanne Royer hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The con-

sent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but was refused.

The interest of Association of Christian Schools International and its associated *amici* arises from the fact that the *amici* pastors, parents and staff members are parties to a case (now tried and awaiting disposition) presently pending in the United States District Court for the Central District of California in which the same issues are before the court, namely, whether the imposition of the federal-state unemployment tax program upon church-schools is authorized by an act of Congress and, if so, whether that imposition violates the Religion Clauses of the First Amendment. *Grace Brethren Church, et al. v. State of California Employment Development Department, et al.*, Civil Case No. 79-93-MRP.

In the instant case, it is believed that the issue of excessive entanglements forbidden by the Establishment Clause were insufficiently developed before the South Dakota Supreme Court and that the brief which *amici curiae* are requesting permission to file will contain a more extensive argument on that constitutional issue. If this argument is accepted, it would be dispositive of the case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL.

INTEREST OF THE AMICI CURIAE

The Association of Christian Schools International (ACSI) represents the interests of over 1400 Christian elementary and secondary schools in the United States. There are more than 235,000 students enrolled in these schools, and membership in ACSI schools is increasing daily.

Grace Brethren Church and David L. Hocking, its pastor; Calvary Church of the Highlands and Reverend Donald Sheely, its pastor; Scott Memorial Baptist Church and Reverend Tim LaHaye, its pastor; Christian Unified Schools of San Diego; Redwood Christian Schools; Sidney Bowen and Patricia Bowen, his wife; Peter Farrelly and Sue Farrelly, his wife; William Tschantz and Janet Tschantz, his wife; Arthur Brandwood and Cheryl Brandwood, his wife; Stanley Edington; R. Florence Murti; and R. Suzanne Royer are churches, schools, pastors, parents and teachers who brought suit for injunctive and declaratory relief in the United States District Court for the Central District of California (Civil Case No. 79-93-MRP) against the State of California and the United States Department of Labor in January of 1979 in order to restrain imposition of the federal-state unemployment compensation program upon them. After full consideration of the evidence, briefs and oral arguments in that case, the court, on September 21, 1979, entered a preliminary injunction in favor of the plaintiffs. Trial on the permanent injunction was held August 12-14, 1980.

The *amici curiae* conduct pervasively religious schools which would not exist except for their religious mission. This activity is now imperiled by the threatened imposition of the unemployment insurance program by the Secretary of Labor.

SUMMARY OF ARGUMENT

The Secretary of Labor has overstepped both statutory and constitutional limitations in decreeing that church-schools so lack sufficient religious purpose and character as to be free from enforced participation in a governmental social program. In doing so, he has already violated constitutionally protected liberties of churches, schools, pastors, parents and teachers, and his directives guarantee, unless judicially interdicted, that those liberties will be violated to an even greater extent in the future.

The Secretary's actions, if found to be licit, portend a nearly limitless subordination of religious institutions to the will of the government.

ARGUMENT

I. The Congress Did Not Extend Unemployment Insurance Coverage to Religious Ministries of Churches

This is a case of first impression in this Court. It poses directly the questions, whether the federal government may define the religious mission of a church, whether it may regulate religion, whether it may enter into entangling relationships with religious schools, and whether it may tax religious expression. The unconstitutional answers given by the Secretary to these questions are coupled with a primary constitutional error—namely, that the Secretary, as a public servant, may act outside of congressional authorization.

A. Nature and Mission of the Religious Schools

The religious schools represented by *amici* were not built by government and are not—even indirectly—maintained by government. They have been created as a trust by Christian people who have dedicated their savings and the gift of religious vocations to that trust. The criteria for employment of teachers in these schools are, first of all, religious. Unlike public or nonsectarian schools, these schools exist for a religious mission *to which everything in the life and operation of the school is subordinate.* These religious entities are considered by their sponsors to be communities of faith, in which all employees work commonly for the religious ends for which the schools are established.

This Court has repeatedly defined such schools, not as secular offshoots of a church, but, in fact (where the school is church-operated) as *the church itself.* The characteristics of these religious schools most frequently relied upon by this Court and other courts in discussing the religious

nature of these entities all apply to the schools represented by *amici*. They:

(a) are all "religious enterprises" (*Lemon v. Kurtzman*, 403 U. S. 602, 618 (1971)), and are conducted as "an integral part of the religious mission" of churches. *Id.; Meek v. Pittenger*, 421 U. S. 349, 366 (1975);

(b) are institutions whose substantial and dominant purpose is the inculcation of religious values. *Tilton v. Richardson*, 403 U. S. 672, 685 (1971);

(c) are institutions in which religion is so pervasive that a substantial portion of their functions is subsumed in the religious mission which is the only reason for the schools' existence. *Meek, supra*, at 366;

(d) are institutions whose affirmative and dominant policy of instruction for children is to assure future adherents to the Christian faith by having control of their education at an early age. *Tilton, supra*, at 685-686;

(e) carry on activities, a substantial portion of which are religiously oriented. *Lemon, supra*, at 618;

(f) conduct and sponsor religiously oriented extra-curricular activities. *Lemon, supra*, at 615;

(g) are housed in buildings, whose exteriors contain identifying religious symbols, and whose interiors, such as classrooms and hallways, contain Christian religious symbols, as well as inspirational quotations from scripture and other religious doctrinal sources. *Lemon, supra*, at 615;

(h) are institutions which have an atmosphere in which religious instruction and religious vocations play a part in the educational function. *Lemon, supra*, at 615;

(i) are institutions which are vehicles for transmitting the Christian faith to the next generation. *Lemon, supra,* at 616;

(j) are institutions which involve substantial religious activity and purpose. *Lemon, supra,* at 616;

(k) employ teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school. *Lemon, supra,* at 617-618; *Meek, supra,* at 371;

(l) employ teachers who work in schools which are operated to inculcate the tenets of the Christian religion and which are dedicated to rearing children in that faith. *Lemon, supra,* at 618; *Meek, id.*;

(m) employ teachers, all of whom are (and must be) Bible-believing-and-practicing Christians. *Lemon, supra,* 618; *Tilton, supra,* at 687-688;

(n) are operated in accordance with the convictions of their memberships, whose source is solely their religion as required by the Bible, for the ultimate purpose of instructing children in the philosophy and mandates of the Scriptures, in such manner as to lay a biblically motivated educational foundation for the free choice of spiritual salvation and discipleship. *State of Ohio v. Whisner,* 47 Ohio St. 2nd 181 (1976);

(o) do not divide instruction into "religious" and "secular" compartments, the entire ongoing life of the church-school community being religious. *Catholic Bishop of Chicago v. NLRB,* 559 F. 2d 1112 (7th Cir. 1977); *Caulfield v. Hirsch,* 95 L. R. R. M. 3164 (E. D. Pa. No. 75-279 Civ., 1977); *McCormick v. Hirsch,* 460 F. Supp. 1337 (M. D. Pa. 1978). As the Supreme Court said of the church-schools considered in *Meek, supra,* in those institutions there is no discrete "secu-

lar" education which can be separated off from their pervasive religious mission: *"Within the institution the two are inextricably intertwined."* *Id.* at 366, (Emphasis supplied.)

There can be no doubt that the persons who assist in the carrying out of these religious ministries are in the employ of a "church", or of "an organization which is operated primarily for religious purposes." 26 U. S. C. § 3309(b)(1). *Alabama v. Marshall,* 636 F. 2d 366 (5th Cir. 1980).

B. The Secretary of Labor's Application of the Statute Is Ultra Vires

Faced with the plain language of 26 U. S. C. § 3309 (b)(1), the aforesaid determinations by this Court, and this Court's most recent admonition that religious entities will not be deemed subject to inhibiting Congressional enactments in the absence of "the affirmative intention of the Congress clearly expressed," *NLRB v. Catholic Bishop,* 440 U. S. 490, 501 (1979), the U. S. Department of Labor nevertheless takes the following position:

> "The only services performed in church-related elementary and secondary schools *recognized* as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA (Federal Unemployment Tax Act) . . . are *those strictly church duties* performed by church employees at the schools *pursuant to their church responsibilities.*" (Directive to State Employment Security Agencies by Lawrence W. Rogers, Administrator of Field Operations, Employment and Training Administration, U. S. Department of Labor, May 30, 1978.) (Emphasis supplied.)

This can only be called *homemade law,* an administrator's invention, the attempt by a public servant to legislate

for the entire nation based upon his personal proclivities or those of a handful of other public servants in the Department of Labor. It is at least psychologically significant that the statement does not say "The only services . . . *which are* within the scope of the exclusion," but rather "The only services *recognized* (*i.e.*, by us individual public servants) as being within the scope of the exclusion. . . ." The Department then invents the concept (nowhere discoverable in the Act) of "strictly church duties", and proceeds to tell the churches what it deems "strictly" to include and what it deems "strictly" to exclude.

II. The Secretary's Interpretation of the 1976 Amendment to FUTA Results in Violation of the Religion Clauses of the First Amendment

In two ways, the interpretation given by the Secretary of Labor to the 1976 amendment to the Federal Unemployment Tax Act results in violation of the Religion Clauses of the First Amendment. The first way consists *in se* of the Secretary's act in preempting of the church's role of defining "church" activity. The second consists of the act of imposing the government unemployment compensation program on the religious ministries which are involved here. Both are violative of the Establishment Clause of the First Amendment and both create injury to interests of church-schools protected by the Free Exercise Clause thereof.

A. Governmental Determination of What Is "Strictly Religious"

In *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94 (1952), the Court noted the century-old recognition of

> ". . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, a power to decide for themselves,

free from state interferences, matters of . . . *faith and doctrine.*" *Id.* at 116. (Emphasis supplied.)

Obviously, the power to define "church" or "religion" is the power to limit religion and its expression. But this Court has already expressly denied that power of restriction-by-definition to government in instances where a government agency had sought to claim it. *United States v. Ballard,* 322 U. S. 78, 86 (1943); *Clay v. United States,* 403 U. S. 698 (1971).

The Secretary of Labor, as noted, has variously held that schools operated by churches are not operated "*primarily* for religious purposes"; also that, though the purposes are religious, they are not, in his view, "strictly" religious. Thus government arrogates to itself the power to define religious ministries. In so doing, it presumes to say what is, and what is not, "*religious*" teaching. This personal posture adopted by individuals in the Department of Labor flies in the face of teachings of this Court and is violative of both the Establishment and Free Exercise Clauses of the First Amendment.

B. Imposition of the Program

1. Application of the Federal Unemployment Tax Act Denies Churches the Free Exercise of Religion

This Court, in *Sherbert v. Verner,* 374 U. S. 398 (1963), provided the test that government regulation which burdens the free exercise of religion must meet: such imposition must be justified by "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." The Court illuminated the concept of "compelling state interest" as follows:

"It is basic that no showing merely of a rational relationship to some colorable state interest would

> suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." *Id.* at 406

The church-schools represented by *amici* are operated as integral parts of the religious mission of the churches with which they are affiliated. These schools have been founded for one purpose alone: to aid the churches in their teaching ministry—a ministry central to the churches' existence—by transmitting the Word of God to the children of Christian believers. The churches, schools, pastors, parents and teachers are all engaged in religious activity and the accomplishment of religious missions through the maintaining of their schools, through teaching in them, and through having one's child educated in them. The policy of the Secretary of Labor in imposing government unemployment compensation coverage burdens this religious activity.

The church-schools represented by *amici* are non-tax-supported. They have not a nickel to spare. Their sources of funding are only as deep as the pockets of their congregation members. Most of these are individuals of modest means. The schools' very limited funding precludes its being siphoned off into programs not germane to their mission and neither needed nor wanted by their employees.

Moreover, these church funds are held as a trust for religious purposes. Concern for religious autonomy in the determination of the proper expenditure of these funds demands that government not requisition such funds for its own secular purposes. Mr. Justice Brennan, in his concurring opinion in *Walz v. Tax Commission*, 397 U. S. 664 (1970), indicated that "taxation would surely influence the allocation of church resources" and would result in "diverting funds otherwise available for religious . . . pur-

poses to the support of the government," and may, for that reason alone, be a violation of the Free Exercise Clause. 397 U. S. at 692. *Amici* concur in this statement. It is no answer to say that the tax may be small in amount. It is a direct tax [1] upon free religious expression and, as such, cannot be imposed without some compelling state interest. *Murdock v. Pennsylvania,* 319 U. S. 105 (1943).

2. Installation of Government as Arbiter Over What Is or Is Not Religious Within Church-Schools Burdens the Free Exercise of Religion by Churches and Their Schools, and Excessively Entangles Government With Religion

The policy of the Secretary of Labor mandates that the unemployment compensation program cover all services performed in church-related elementary and secondary schools which are not "*strictly church duties* performed by church employees at the school pursuant to their church responsibilities."

This policy requires that government officials in charge of the program make determinations of

—what are "church duties"

—which of these are "strictly" church duties

—what are the employees' "church responsibilities"

—which of their "strictly church duties" are performed at the school "pursuant to their church responsibilities".

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1. *Cf. Braunfeld v. Brown,* 366 U. S. 599 (1961) (misapplied by the Court below), where a merely indirect financial burden on Sabbath observance was found constitutionally permissible by a plurality of the Court.

It is thus incumbent upon a state not merely to make religious judgments, but indeed to conduct whatever investigations and evaluations may be required as the basis for making such judgments.

Such investigations have therefore proceeded in states which complied with the Secretary's directive. A striking example of this is seen in the *Grace Brethren Church* case, *supra*, in the investigation, by unemployment compensation officials, of Pastor Reuben Sequeira.[2] Pastor Sequeira was visited by a State auditor on April 5, 1979, who demanded to see all printed materials utilized in the Pastor's school and to examine the school's curriculum. The visiting State official, over the protest of Pastor Sequeira, stated that the church and its school must be regarded as separate entities. The same official, in examining the curriculum, textbooks, music, aquarium and all other facilities of the school, made two headings: "secular" and "religious", and assigned all items to one heading or the other.[3]

It may be argued that this exercise of State power was simply aberrant conduct on the part of a particular State agent, but plainly it was not. It was, instead, the practical and logical carrying out of the aforementioned mandates.

3. Enforcement of the Unemployment Compensation Program Would Violate the Establishment Clause by Excessively Entangling Government With Religion

This Court has frequently spoken a condemnation of "excessive entanglements" between church and state. Two features of that condemnation are to be especially noted.

2. See Affidavit of Pastor Sequeira hereto attached as Appendix A.

3. Audits of this type have already received the disapprobation of this Court. *New York v. Cathedral Academy*, 434 U. S. 125, 132 (1977).

First, such entanglements not only enmesh government in church endeavors but also impair the free exercise of religion through "government direction of churches". *Lemon v. Kurtzman,* 403 U. S. 602, 620 (1971). *Second,* the "entanglement" cases are almost entirely concerned, not with actual entanglement, but with the *potential* for entanglement. *Lemon* tested the Pennsylvania statute there involved on a motion to dismiss, and there was no record evidence of entanglement. The Court, however, condemned the Pennsylvania statute on the basis of the "hazards" and "dangers" (*ibid.*) which it posed, a relationship "pregnant" with involvement. Therefore, the entanglement which will likely flow from a statute condemns that statute.

In *Walz v. Tax Commission,* 397 U. S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court expressed particular concern over the introduction of any "element of governmental evaluation and standards," and warned, on Establishment Clause grounds, against policies which can lead to "confrontations and conflicts" between government and churches. *Id.* at 674.

In *Lemon, supra,* the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in *Walz* wherein he spoke of "programs, whose very nature is apt to entangle the state in details of administration." *Id.* at 615. The Court also warned against "sustained and detailed administrative relationships (between government and these schools) for enforcement of statutory or administrative standards." *Id.* at 621.

The Court also noted that, with respect to the grants to colleges upheld in *Tilton v. Richardson,* 403 U. S. 672 (1971), there were no entanglements:

> "There are no continuing financial relationships or dependencies, no annual audits, and *no government analysis* of an institution's expenditures *on secular as distinguished from religious activities.*" *Id.* at 688. (Emphasis supplied.) [4]

The Supreme Court, in *Walz*, has indicated that the processes of taxation of church activity (*i.e.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes", *Walz, supra,* at 674) constitute, without more, entanglements between government and religion.

At the outset of this administrative relationship, the State must audit the financial records of the church in order to determine how much of the church's funds has been applied to "secular" functions of teachers and how much has been applied to their "religious" functions.

The church is then required, on a regular basis, to make reports to the State concerning liability for contributions, and is also required to keep its books open for inspection by State auditors. The church will also have to post government notices on their premises regarding unemployment compensation, thus being made the instrument of the State in disseminating information to persons who are performing religious functions. This information may also be such as to encourage fractionalization of the school faith community.[5]

Many other administrative commands must be obeyed, and limitless inspections and evaluations of reli-

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4. Similar inspection was enjoined in *Surinach v. Pesquera des Busquets,* 604 F. 2d 73 (1st Cir. 1979), on the basis of its entangling nature.

5. See Affidavit of Eloise Brown, filed in the *Grace Brethren Church* case, and attached hereto as Appendix B.

gious matters permitted, most under criminal penalty for non-compliance.[6]

This type of entanglement, when coupled with the inhibitive element of coerced State extraction of funds intended for religious use, is "excessive entanglement" and impermissible by virtue of the Establishment Clause of the First Amendment.

4. Requiring Government to Rule Upon Whether a Teacher Was Discharged for "Misconduct", or Left for "Good Cause," Burdens the Free Exercise of Religion by Churches and Religious Schools, and Excessively Entangles Government With Religion.

In safeguarding the integrity of the religious mission with which he is entrusted, a pastor must exercise the responsibility of discharging teachers, and others, for religious or moral behavior which might, or might not, meet the secular standards of "misconduct" under his state's unemployment insurance law. But submitting a pastor's religious or moral decision to discharge an employee to government evaluation involves two distinct unconstitutional aspects: the free religious choice of the pastor is burdened by the deterrent effect of the risk of incurring state taxation as a result of the discharge; and government sets itself up as judge of whether the discharge was actually for religious or moral misconduct. This latter aspect itself suffers from two distinct defects: (a) government is put into the forbidden position of applying a religious standard to employee conduct;[7] and (b)

6. See, for example, California Unemployment Insurance Code §§ 1085, 1086, 1088, 1089, 1092, 1126, 1128, 1703, 1735, 1815, 1953, 2105, 2108, 2109.

7. This forbidden inquiry is common, as well, to determinations of whether an employee left for reasons of "just cause" where doctrinal or moral disputes are implicated.

government is made to probe into religious determinations in order to ascertain the extent of religious motivation therefor. Both of these defects represent impermissible entanglements between government and religious activity.

As the Court stated in *Catholic Bishop of Chicago,* when speaking of government inquiry into teacher dismissals:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." 440 U. S. at 502 (Emphasis supplied).

This entangling and chilling process results from involvement of government in a "church-teacher relationship in a church-operated school [which] differs from the employment relationship in a public or other non-religious school." *Id.* at 504.

Teachers play a "key role", *Catholic Bishop, supra* at 501, in the religious mission of the church-school. That mission embraces at least the following areas:

—curriculum

—pervasiveness of Bible-centered religion in the life of the school

—discipline

—dress

—moral conduct of faculty and students

—religious character and religious witnesses of the teachers

—religious atmosphere

—the faculty as a community of faith

—control of teaching and school life from point of view of faith and morals

—religious holidays and time and character of religious observances.

With respect to each of these sensitive areas, it is possible that cause may arise which will warrant dismissal, on religious grounds, of an employee in a religious school. In that event, following a claim for unemployment compensation, the secular authority (in the form of the hearing examiner) would be called upon to rule upon whether the dismissal was for just cause, or upon whether the conduct of the employee constituted gross misconduct. The hearing examiner would either (a) enter into the merits of the religious cause for dismissal (as, for example, by determining whether any use of alcohol by a teacher is, in fact, Biblically forbidden), or (b) ignore the religious objection (and merely inquire whether the teacher was sober, punctual and efficient in his or her work). Under (a) the hearing examiner would plainly be in violation of Establishment Clause limitations in that, as seen, the state may not make religious judgments. Under (b) the hearing examiner would be in violation of the Free Exercise Clause in that he would be suppressing a basic religious freedom—the right of a religious institution to dismiss an employee where that employee violated the faith or moral requirements of the institution.[8] Conclusive evidence of all of this is seen in the testimony of the

8. Although the church-schools of *amici* maintain a conscientious opposition to the practice of abortion and extra-marital sex, the Federal Unemployment Tax Act forbids a state to deny an award of benefits "on the basis of pregnancy or termination of pregnancy". 26 U. S. C. § 3304(a)(12). Thus a church employee dismissed for pregnancy out of wedlock or for procuring an abortion would be paid benefits at the expense of the church.

Government officials called as expert witnesses by the Secretary of Labor at the trial in *Grace Brethren, supra,* August 13, 1980. This evidence may be summarized as follows:

a. A secular agency (the hearing examiner or like state functionary) entertains and passes upon conflicting claims as to whether the employee of a religious body was discharged because of violation of that body's articles of faith. (T2, 177-180).[9] That is to say, the state has jurisdiction to determine religious questions. (*Ibid.*; T2, 200).

b. The religious body which is the employer is made to bear the burden of proof that (a) the particular doctrine was part of an agreement between itself and the discharged employee and (b) that the employee breached that agreement. (T2, 180).

c. Where the religious body discharges the employee due to its judgment that the employee had shown a decline in religious fervor, the state agent must declare this not to be misconduct unless it has caused harm to the religious body, and the *state* is the judge of whether "harm" has in fact taken place. (T2, 183-184).

d. The agent of the state must become familiar with religious doctrine (T2, 197) in order to be able to determine not merely whether there has occurred a violation of an express rule of the religious body, but even to determine the religiously subtler issue of whether there has occurred a violation of an implied rule of that body. (*Ibid.*).

e. Within the state's jurisdiction to determine religious reasons for discharge is also jurisdiction to weigh and determine moral reasons for discharge. (T2, 200).

f. Whether or not an employee of a religious body, who was discharged on account of incompetence, was in-

9. The references are to the trial transcript.

competent to communicate the doctrine of the religious body is a matter to be determined by the state (T2, 202-203), and if this incompetence were not willful, it would not be construed as misconduct. (T2, 203).

g. The state determines whether the religious body need have given express warning to its employee, and whether that warning was reasonable or needed. (T2, 207-209).

h. The state determines whether a particular rule of the religious body is an important one. (T2, 210-211).

i. The state makes "a determination of the effect [of the employee's conduct] on the religion or the church". (T2, 212).

j. The state may determine whether a religious body is a church (T2, 249), and whether a particular employee of that body is a minister. (T2, 265).

k. Where a religious body and its discharged employee dispute the reasonableness of the rule of the religious body which that body claims the employee violated, the state will determine the issue of reasonableness. (T2, 250-252).

l. In the case wherein there appears to have been a misunderstanding over whether a doctrinal point had been agreed upon by the religious body and its employee, the state must find in favor of the employee. (T2, 255).

m. Where the religious body and its employee disagree upon a point of doctrine, "that situation would lend itself to a decision in favor of the employee". (T2, 259).

A worse catalog of Establishment Clause violations would be difficult to imagine. Here is not merely unlawful entanglement; the inevitable effect of the application

of the Act to religious schools is a forbidden envelopment of the interests of the latter by government. Church-state separation is utterly breached by such processes as that application calls for.

The post-discharge processes are, of course, a necessary working part of the unemployment compensation program. If there is no allowance to the employer for misconduct situations, then every discharge is compensable. If such allowance is made, then the state *is* obligated to determine the existence, or not, of misconduct. But in the application of the Act to religious organisms, the term "misconduct" is necessarily weighted with a range of religious and moral matters, and if anything is clear under the Constitution, it is that government may have *"no role"* in passing upon such matters.

Also, however, is the potential effect upon *present* employees of the exercise by government of that forbidden role. In *Catholic Bishop of Chicago, supra,* this Court pointed to the effect of the very presence of NLRB jurisdiction over the religious schools there considered:

> " 'The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools.' " *Id.* at 496.

C. Lack of Compelling State Interest.

Where (as here) substantial, non-frivolous Free Exercise claims are made against a particular governmental action, it is no answer to say that that action has been undertaken in the public interest. The achieving of worthwhile, or even needful, public objectives does not justify the restricting of religious liberty. Under *Sherbert* and *Wisconsin v. Yoder,* 406 U. S. 205 (1972), the hurdle which government must cross, if it is to restrict religious liberty, is far higher.

Plainly, no compelling state interest is involved in forcing the challenged unemployment compensation and disability insurance programs on church-schools. An extremely strong and clear declaration by the Congress, that some interest of critical national significance exists—"paramount",[10] in the words of this Court—would need to be shown to establish that Congress believed that the application of the program to religious educational ministries was of supreme necessity. But no such declaration exists. Not even a hint of a "compelling" interest appears in the debates. The 1976 amendments extending FUTA were deemed merely socially useful or desirable. The amendments to FUTA were extremely extensive, and the inclusion of elementary and secondary schools was but one feature of them. The debates indicated that an important reason for extending coverage to new groups (among these the large group of employees of state and local governments) was "to keep the system from going broke." While the inclusion of employees of religious schools can have no real effect on keeping the system solvent, even if it did, the jacking up of a failing social program by enforced contributions from religious congregations would in no sense warrant infringement upon religious liberty.

10. In *Yoder*, religious liberty interests were held to outweigh even those governmental interests "at the very apex of the function of a State." 406 U. S. at 213.

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

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FILED MAY 18, 1979

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GRACE BRETHREN CHURCH OF LONG BEACH and REVEREND DAVID L. HOCKING, its Pastor, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, Acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT: The Honorable MARTIN R. GLICK, Director of Employment Development, et al.,
Defendants

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Cross-Claimant,

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States,

Cross-Defendant.

No. 79 0093 MRP (Kx)

Declaration of Dr. Reuben Sequeira

Date: May 23, 1979

Time: 9:30 A. M.

Place: JUDGE PFAELZER'S COURTROOM

I know personally of the matters herein contained and if called upon to testify under oath would and could testify as follows:

1. I reside at 1675 Grand Avenue, San Rafael, California. I am a taxpayer and a citizen of the United States and of California.

2. I am presently, and have been for the last ten years, the pastor of Trinity Community Church, located in San Rafael, California. As pastor, I oversee the running of the church, including all of its ministries.

3. Trinity Community Church has, as one of its ministries, a preschool known as Daystar Christian Preschool. The preschool is an integral part of the vision and extended teaching ministry of Trinity Community Church in its God-given mandate to train children.

4. In January of 1979, the Church received correspondence from the California Employment Development Department, including a form letter dated January 26, 1979, informing us that we were subject to the unemployment insurance. A copy of the correspondence is attached hereto as Exhibit A, and by this reference incorporated herein.

5. On February 1, 1979 I sent a reply letter to the Department, a copy of which is attached hereto as Exhibit B, and by this reference incorporated herein.

6. Sometime in March of 1979, I received a call from Mr. Ted E. Atz, Jr., auditor of the State of California. He requested an interview with me concerning Daystar Christian Preschool.

7. On April 5, 1979 at 4:00 P.M., Mr. Atz came to our Church. He asked to see any printed material that I could give to him. I gave him a copy of our current brochure for Daystar Christian Preschool, a copy of which is attached hereto as Exhibit C, and by this reference incorporated herein.

8. Mr. Atz then read to me from some guidelines that he had brought, as to the reasons why the school is now subject to the unemployment insurance, and explained that although the State had not taxed the school before, they were to begin to do so now. The position of the State, he said, was that since the Church and the school were separate, the school was taxable. At this, we had him note the sponsorship statement in the brochure. We explained to him the ministry of the school and noted that the Church Council rather than the School Council is the ultimate governing body of the school, as this ministry is no different than any other ministry of the Church.

9. The fact that the school was controlled by the Church apparently made little difference to Mr. Atz. His response was that the guidelines were to distinguish between the secular and the religious school. He began to look over our curriculum. He made two column headings on a paper, one of them being secular, the other religious. In looking over the brochure, he saw the worship center and put that under religious instruction without qualification. When it came down to music, he questioned whether it should be religious or secular. I told him that music was ordained of God, God has given us music, he is a God of harmony, His creation sings, and music was to glorify God. He asked me if we sang anything else besides religious songs. I told him that all the songs that we sing are glorifying to God. He put music under the religious heading.

10. Mr. Atz also asked about the nature center. I replied, "Well, we have an aquarium with fish in it. The children learn about how to feed the fish, what the fish are like, what the fish do, study their movement, etc. However, when we come to the fact of how fish came into being, we talk about a loving Creator who made them." He decided to put that under both religious and secular headings.

11. In art, Mr. Atz wanted to know what we drew and what we did in the art center. Again, we explained to him that God is a God of order, symmetry and color. One cannot have true art without having its origin in God. I then described a particular project where the children made cocoons with caterpillars in them. A few days later they made butterflies. This transformation was to symbolize the resurrection of Jesus Christ and our resurrection. The caterpillar had been transformed by the power of God. Thus, the teaching of the resurrection became im-

planted in the young lives. God even teaches the resurrection in His Creation. After giving him this explanation, I asked Mr. Atz whether this was religious or secular. He ended up putting it in both columns.

12. Mr. Atz's next inquiry concerned the block center. He was going to put it under the secular column, until I explained to him that while the block center is a very vital part of teaching manipulative games, balance, symmetry, coordination, etc., it was designed not only for physical and mental growth, but to teach Christian values in social concerns. As God has made us to dwell in communities and not in isolation, we view it as important to teach Christian values in relating from a Biblical viewpoint. He then put the block center under both columns.

13. Another question that Mr. Atz asked was whether the school was licensed by the State. I told him that it was. He seemed to imply that since it was, it was an admission that the State had authority over the school. I let him know that the licensing of the School was in no way our admission that the State had control or authority over the school. Rather, it was a procedure to demonstrate our willingness to cooperate with the State. Indeed, our school exceeds the State requirements. I also told him that if licensing the school meant an admission that the State had authority over the Church, then we would not receive any further licensing from the State.

14. Before Mr. Atz left, I asked him what his recommendation would be from this investigation. He stated that he could not give it at the time, but that we would be hearing from him. He said that his biggest problem would be having to convince his superior, but that if it was unfavorable to us, we could appeal it. He has not, at the time of the signing of this Declaration, let us know what his decision is.

Executed at Los Angeles, California, this 16th day of May, 1979.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Dr. REUBEN SEQUEIRA
By: Lisa A. Runquist

APPENDIX B

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FILED MAY 18, 1979

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GRACE BRETHERN CHURCH OF LONG BEACH and REVEREND DAVID L. HOCKING, its Pastor, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, Acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT: The Honorable MARTIN R. GLICK, Director of Employment development, et al.,
Defendants.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Cross-Claimant,

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States,

Cross-Defendant.

No. 79 0093 MRP (Kx)

Declaration of Eloise Brown

Date: May 23, 1979

Time: 9:30 A. M.

Place: JUDGE PFAELZER'S COURTROOM

I know personally of the matters herein contained and if called upon to testify under oath would and could testify as follows:

1. I reside at 1046 W. 79th Street, Los Angeles, California. I am a taxpayer and a citizen of the United States and of California.

2. I am presently, and have been since July, 1978, Administrator of Normandie Christian School of Los Angeles.

3. Sometime after I began working for Normandie Christian School we received a poster from the Department of Benefit Payments, a copy of which is attached hereto as Exhibit A and by this reference incorporated herein.

Executed at Los Angeles, California this 16 day of May, 1979.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ ELOISE BROWN

Exhibit A

NOTICE TO EMPLOYEES

THIS EMPLOYER IS REGISTERED UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE, AND WAGE CREDITS ARE BEING ACCUMULATED BY YOU FOR

UNEMPLOYMENT INSURANCE

(Paid for entirely by EMPLOYERS' taxes)

and

DISABILITY INSURANCE

(Paid for entirely by WAGE EARNERS' taxes)

- WHEN YOU ARE UNEMPLOYED AND READY, WILLING AND ABLE TO WORK, YOU MAY BE ELIGIBLE TO RECEIVE UNEMPLOYMENT INSURANCE

  You must file a claim for Unemployment Insurance at the nearest Employment Development Department Office, and register for work.

- IF YOU WORK LESS THAN YOUR NORMAL FULL-TIME HOURS AND EARN LESS THAN YOUR WEEKLY BENEFIT AMOUNT BECAUSE YOUR EMPLOYER DOES NOT HAVE WORK FOR YOU, YOU MAY ALSO RECEIVE BENEFITS

  You must file a claim for Unemployment Insurance at the nearest Employment Development Department Office.

- WHEN YOU ARE UNABLE TO WORK BECAUSE OF SICKNESS OR INJURY, YOU MAY BE ELIGIBLE TO RECEIVE DISABILITY INSURANCE AND/OR HOSPITAL BENEFITS

  1. If this firm operates under an approved Vountary Plan of Disability Insurance and you have chosen to be covered by it, claim forms should be obtained from your employer.
  2. For State Disability Insurance, claim forms may be obtained from your doctor, hospital, or any Employment Development Department Office. The First Claim must be mailed not later than the 20th day after the first day for which benefits are payable if you are to receive credit from the time you first became disabled. Earlier filing will speed your payment.

- GET FULL INFORMATION AT YOUR LOCAL EMPLOYMENT DEVELOPMENT DEPARTMENT OFFICE
STATE OF CALIFORNIA

EMPLOYMENT DEVELOPMENT DEPARTMENT

Claims should be filed promptly. You may lose benefits to which you would otherwise be entitled if you delay filing of your claim.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion and Brief *Amicus Curiae* were served, by first class mail, postage pre-paid, this 18th day of December, 1980, on the following:

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